
SUBSTITUTE SENATE BILL 5449

State of Washington

59th Legislature

2005 Regular Session

By Senate Committee on Water, Energy & Environment (originally sponsored by Senators Poulsen, Swecker, Pridemore, Kline, Fraser and Rockefeller)

READ FIRST TIME 03/02/05.

1 AN ACT Relating to providing the department of ecology with lien
2 authority to facilitate the recovery of remedial action costs; amending
3 RCW 70.105D.050 and 70.105D.060; and adding a new section to chapter
4 70.105D RCW.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 70.105D
7 RCW to read as follows:

8 (1) It is in the public interest for the department to recover
9 remedial action costs incurred in discharging its responsibility under
10 this chapter, as these recovered funds can then be applied to the
11 cleanup of other facilities. Thus, in addition to other cost-recovery
12 mechanisms provided under this chapter, this section is intended to
13 facilitate the recovery of state funds spent on remedial actions by
14 providing the department with lien authority. This will also prevent
15 a facility owner or mortgagee from gaining a financial windfall from
16 increased land value resulting from department-conducted remedial
17 actions at the expense of the state taxpayers.

18 (2) If the state of Washington incurs remedial action costs

1 relating to a remedial action of real property, and those remedial
2 action costs are unrecovered by the state of Washington, the department
3 may file a lien against that real property.

4 (a) Except as provided in (c) of this subsection, liens filed under
5 this section shall have priority in rank over all other privileges,
6 liens, encumbrances, or other security interests affecting the real
7 property, whenever incurred, filed, or recorded, except for the
8 following liens:

9 (i) Local and special district property tax assessments; and

10 (ii) Mortgage liens.

11 (b) Liens filed pursuant to (a) and (c) of this subsection shall
12 not exceed the remedial action costs incurred by the state.

13 (c)(i) If the facility is abandoned or the owner has failed to
14 substantially comply with an order issued under this chapter, the
15 department may choose to limit the amount of the lien to the increase
16 in the fair market value of the real property that is attributable to
17 a remedial action conducted by the department. The increase in fair
18 market value shall be determined by subtracting the county assessor's
19 value of the real property for the most recent year prior to remedial
20 action being initiated from the value of the real property after
21 remedial action. The value of the real property after remedial action
22 shall be determined by the bona fide purchase price of the real
23 property or by a real estate appraiser retained by the department.
24 Liens limited in this way have priority in rank over all other
25 privileges, liens, encumbrances, or other security interests affecting
26 the real property, whenever incurred, filed, or recorded.

27 (ii) For the purposes of this subsection, "abandoned" means there
28 has not been significant business activity on the real property for
29 three years or property taxes owed on the real property are three years
30 in arrears prior to the department incurring costs attributable to this
31 lien.

32 (d) The department shall, when notifying potentially liable persons
33 of their potential liability under RCW 70.105D.040, include a notice
34 stating that if the department incurs remedial action costs relating to
35 the remediation of real property and the costs are not recovered by the
36 department, the department may file a lien against that real property
37 under this section.

1 (e) Except for emergency remedial actions, the department must
2 provide notice to the following persons before initiating remedial
3 actions conducted by persons under contract to the department on real
4 property on which a lien may be filed under this section:

5 (i) The real property owner;

6 (ii) Mortgagees;

7 (iii) Lienholders of record;

8 (iv) Persons known to the department to be conducting remedial
9 actions at the facility at the time of such notice; and

10 (v) Persons known to the department to be under contract to conduct
11 remedial actions at the facility at the time of such notice.

12 For emergency remedial actions, this notice shall be provided
13 within thirty days after initiation of the emergency remedial actions.

14 (3) Before filing a lien under this section, the department shall
15 give the owner of real property on which the lien is to be filed and
16 mortgagees and lienholders of record a notice of its intent to file a
17 lien:

18 (a) The notice required under this subsection (3) must be sent by
19 certified mail to the real property owner and mortgagees of record at
20 the addresses listed in the recorded documents. If the real property
21 owner is unknown or if a mailed notice is returned as undeliverable,
22 the department shall provide notice by posting a legal notice in the
23 newspaper of largest circulation in the county the site is located.
24 The notice shall provide:

25 (i) A statement of the purpose of the lien;

26 (ii) A brief description of the real property to be affected by the
27 lien;

28 (iii) A statement of the remedial action costs incurred by the
29 state related to the real property affected by the lien;

30 (iv) A brief statement of facts showing probable cause that the
31 real property is the subject of the remedial action costs incurred by
32 the department; and

33 (v) The time period following service or other notice during which
34 any recipient of the notice whose legal rights may be affected by the
35 lien may comment on the notice.

36 (b) Any comments on the notice must be received by the department
37 on or before thirty days following service or other provision of the
38 notice of intent to file a lien.

1 (c) If no comments are received by the department, the lien may be
2 filed on the real property immediately.

3 (d) If the department receives any comments on the lien, the
4 department shall determine if there is probable cause for filing the
5 certificate of lien. If the department determines there is probable
6 cause, the department may file the lien. Any further challenge to the
7 lien may only occur at the times specified under RCW 70.105D.060.

8 (e) If the department has reason to believe that exigent
9 circumstances require the filing of a lien prior to giving notice under
10 this subsection (3), or prior to the expiration of the time period for
11 comments, the department may file the lien immediately. For the
12 purposes of this subsection (3), exigent circumstances include, but are
13 not limited to, an imminent bankruptcy filing by the real property
14 owner, or the imminent transfer or sale of the real property subject to
15 lien by the real property owner, or both.

16 (4) A lien filed under this section is effective when a statement
17 of lien is filed with the county auditor in the county where the real
18 property is located. The statement of lien must include a description
19 of the real property subject to lien and the amount of the lien.

20 (5) Unless the department determines it is in the public interest
21 to remove the lien, the lien continues until the liability for the
22 remedial action costs have been satisfied through sale of the real
23 property or other means agreed to by the department.

24 (6)(a) This section does not apply to real property owned by a
25 local government or special purpose district or real property used
26 solely for residential purposes and consisting of four residential
27 units or less at the time the lien is recorded. This limitation does
28 not apply to illegal drug manufacturing and storage sites under chapter
29 64.44 RCW.

30 (b) If the real property owner has consented to the department
31 filing a lien on the real property, then only subsection (3)(a)(i)
32 through (iii) of this section requiring notice to mortgagees and
33 lienholders of record apply.

34 **Sec. 2.** RCW 70.105D.050 and 2002 c 288 s 4 are each amended to
35 read as follows:

36 (1) With respect to any release, or threatened release, for which
37 the department does not conduct or contract for conducting remedial

1 action and for which the department believes remedial action is in the
2 public interest, the director shall issue orders or agreed orders
3 requiring potentially liable persons to provide the remedial action.
4 Any liable person who refuses, without sufficient cause, to comply with
5 an order or agreed order of the director is liable in an action brought
6 by the attorney general for:

7 (a) Up to three times the amount of any costs incurred by the state
8 as a result of the party's refusal to comply; and

9 (b) A civil penalty of up to twenty-five thousand dollars for each
10 day the party refuses to comply.

11 The treble damages and civil penalty under this subsection apply to all
12 recovery actions filed on or after March 1, 1989.

13 (2) Any person who incurs costs complying with an order issued
14 under subsection (1) of this section may petition the department for
15 reimbursement of those costs. If the department refuses to grant
16 reimbursement, the person may within thirty days thereafter file suit
17 and recover costs by proving that he or she was not a liable person
18 under RCW 70.105D.040 and that the costs incurred were reasonable.

19 (3) The attorney general shall seek, by filing an action if
20 necessary, to recover the amounts spent by the department for
21 investigative and remedial actions and orders, and agreed orders,
22 including amounts spent prior to March 1, 1989.

23 (4) The attorney general may bring an action to secure such relief
24 as is necessary to protect human health and the environment under this
25 chapter.

26 (5)(a) Any person may commence a civil action to compel the
27 department to perform any nondiscretionary duty under this chapter. At
28 least thirty days before commencing the action, the person must give
29 notice of intent to sue, unless a substantial endangerment exists. The
30 court may award attorneys' fees and other costs to the prevailing party
31 in the action.

32 (b) Civil actions under this section and RCW 70.105D.060 may be
33 brought in the superior court of Thurston county or of the county in
34 which the release or threatened release exists.

35 (6) Any person who fails to provide notification of releases
36 consistent with RCW 70.105D.110 or who submits false information is
37 liable in an action brought by the attorney general for a civil penalty

1 of up to five thousand dollars per day for each day the party refuses
2 to comply.

3 (7) Any person who owns real property that is subject to a lien
4 filed under section 1 of this act may petition the department to have
5 the lien removed or the amount of the lien reduced. If, after
6 consideration of the petition and the information supporting the
7 petition, the department decides to deny the request, the person may,
8 within ninety days after receipt of the department's denial, file suit
9 for removal or reduction of the lien. The person is entitled to
10 removal of a lien filed under section 1(2)(a) of this act if they can
11 prove by a preponderance of the evidence that the person is not a
12 liable party under RCW 70.105D.040. The person is entitled to a
13 reduction of the amount of the lien if they can prove by a
14 preponderance of the evidence:

15 (a) For liens filed under section 1(2)(a) of this act, the amount
16 of the lien exceeds the remedial action costs the department incurred
17 related to cleanup of the real property; and

18 (b) For liens filed under section 1(2)(c) of this act, the amount
19 of the lien exceeds the remedial action costs the department incurred
20 related to cleanup of the real property or exceeds the increase of the
21 fair market value of the real property solely attributable to the
22 remedial action conducted by the department.

23 **Sec. 3.** RCW 70.105D.060 and 1994 c 257 s 13 are each amended to
24 read as follows:

25 The department's investigative and remedial decisions under RCW
26 70.105D.030 and 70.105D.050, its decisions regarding filing a lien
27 under section 1 of this act, and its decisions regarding liable persons
28 under RCW 70.105D.020(~~((8) and))~~ (16), 70.105D.040, 70.105D.050, and
29 section 1 of this act shall be reviewable exclusively in superior court
30 and only at the following times: (1) In a cost recovery suit under RCW
31 70.105D.050(3); (2) in a suit by the department to enforce an order or
32 an agreed order, or seek a civil penalty under this chapter; (3) in a
33 suit for reimbursement under RCW 70.105D.050(2); (4) in a suit by the
34 department to compel investigative or remedial action; (~~and~~) (5) in
35 a citizen's suit under RCW 70.105D.050(5); and (6) in a suit for
36 removal or reduction of a lien under RCW 70.105D.050(7). Except in
37 suits for reduction or removal of a lien under RCW 70.105D.050(7), the

1 court shall uphold the department's actions unless they were arbitrary
2 and capricious. In suits for reduction or removal of a lien under RCW
3 70.105D.050(7), the court shall review such suits pursuant to the
4 standards set forth in RCW 70.105D.050(7).

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